STATE OF MICHIGAN

COURT OF APPEALS

DUJUAN LIGONS, Personal Representative of the Estate of EDRIS LIGONS,

Plaintiff-Appellee/Cross-Appellee,

v

CRITTENTON HOSPITAL, a/k/a CRITTENTON HOSPITAL MEDICAL CENTER,

Defendant-Appellee/Cross-Appellant,

and

DAVID BRUCE BAUER, M.D., and ROCHESTER EMERGENCY GROUP, P.C.,

Defendants-Appellants/Cross-Appellees.

FOR PUBLICATION
August 18, 2009
9:00 a.m.

No. 278622
Oakland Circuit Court
LC No. 06-073762-NH

Advance Sheets Version

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

HOEKSTRA, J.

Plaintiff, Dujuan Ligons, as the personal representative of the estate of Edris Ligons, deceased, brought this wrongful death, medical malpractice action against Crittenton Hospital, David Bruce Bauer, M.D. (Dr. Bauer), and Dr. Bauer's practice, Rochester Emergency Group, P.C. (REG). Defendants Dr. Bauer and REG and defendant Crittenton Hospital filed separate motions for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff failed to file a sufficient notice of intent pursuant to MCL 600.2912b, or a sufficient affidavit of merit pursuant to MCL 600.2912d, within the applicable limitations period. The trial court denied the motions. Defendants Dr. Bauer and REG thereafter filed an application for leave to file an interlocutory appeal, which this Court denied. *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered January 16, 2008 (Docket No. 278622). However, our Supreme Court, in lieu of granting Dr. Bauer and REG's application for leave to appeal, remanded the case to this Court for consideration as on leave granted. *Ligons v Crittenton Hosp*, 482 Mich 1005 (2008). This Court thereafter granted Crittenton Hospital's application for leave to file a

delayed cross-appeal and ordered that all further filings be made in this case. *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered March 2, 2009 (Docket No. 288793).

We conclude that plaintiff's supplemental notice of intent complied with MCL 600.2912b, but that his affidavits of merit failed to comply with MCL 600.2912d. Because the filing of plaintiff's complaint and the accompanying affidavits of merit did not toll the wrongful death saving period and the wrongful death saving period has since expired, the proper remedy for plaintiff's failure to submit a conforming affidavit of merit is dismissal with prejudice. We therefore reverse and remand for entry of an order of dismissal with prejudice.

I. Basic Facts and Procedural History

This malpractice action arises from Dr. Bauer's treatment of the decedent on January 22, 2002, at the Crittenton Hospital emergency room. According to plaintiff, the 54-year-old decedent, who had recently had a colonoscopy, began experiencing vomiting, diarrhea, chills, and fever. She went to the emergency room at Crittenton Hospital on January 22, 2002, and was treated by Dr. Bauer. She allegedly was treated for gastroenteritis and dehydration, was given antibiotics and fluids, and then discharged later that day. She continued to experience severe pain and went back to the emergency room the next day, where she was diagnosed with peritonitis because of a perforated colon. She developed sepsis and surgical resection was not possible. Despite receiving extensive medication, the sepsis led to multiple organ failure, resulting in the decedent's death on January 29, 2002.

Plaintiff was appointed personal representative of the decedent's estate on February 22, 2005. On June 8, 2005, plaintiff served a notice of intent (NOI) to file a medical malpractice action on Dr. Bauer, REG, and Crittenton Hospital pursuant to MCL 600.2912b. A supplemental NOI was later served on October 21, 2005. Although the two-year period of limitations for a medical malpractice action, MCL 600.5805(6), had expired, plaintiff, as the personal representative of the decedent's estate, had additional time in which to file a lawsuit under the wrongful death saving statute, MCL 600.5852. The statute provides that when a person dies before the period of limitations has run or within 30 days after the period of limitations has run, the personal representative may bring an action at any time within two years after letters of authority are issued, but no later than three years after the period of limitations has run. Plaintiff filed this action against defendants on April 7, 2006.

In March 2007, defendants Dr. Bauer and REG filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff failed to properly commence this action because both the NOI that was served before the complaint was filed and the affidavits of merit that were filed along with the complaint failed to comply with statutory requirements. These defendants argued that dismissal with prejudice was required because the three-year "ceiling" available under the wrongful death saving statute had expired on January 22, 2007, leaving no time to file a conforming NOI or affidavit of merit. Defendant Crittenton Hospital later filed a separate motion raising the same arguments. The trial court denied defendants' motions, finding that the NOI and the affidavits of merit complied with statutory requirements.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(7). *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If there are no factual disputes and reasonable minds cannot differ regarding the legal effect of the facts, the decision whether a plaintiff's claim is barred is a question of law. *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002). Our analysis of this case turns on the requirements of MCL 600.2912b and 600.2912d. The proper application of a statute is a question of law that is reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. Notice of Intent

MCL 600.2912b(1) provides, in part, that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." Regarding the requirements of the prescribed notice, MCL 600.2912(b)(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The NOI need not be in any particular format, but it "must identify, in a readily ascertainable manner, the specific information mandated by [MCL 600.2912b(4)]." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 696; 684 NW2d 711 (2004). "[N]o portion of the notice of intent may be read in isolation; rather, the notice of intent must be read as a whole." *Miller v Malik*, 280 Mich App 687, 696; 760 NW2d 818 (2008). The plaintiff bears the burden of establishing compliance with MCL 600.2912b. *Roberts*, *supra* at 691.

Dr. Bauer and REG contend that plaintiff's NOI failed to articulate a factual basis for his claim, failed to articulate the applicable standard of care, and failed to articulate the manner in which the alleged breach of the standard of care was the proximate cause of the decedent's

death.[1] Similarly, Crittenton Hospital argues that the NOI failed to set forth the manner in which that defendant allegedly breached the applicable standard of care, failed to articulate any alleged action that should have been taken to achieve compliance with the standard of care, and failed to set forth the manner in which the alleged breach of the standard of care caused the decedent's death.

We conclude that the factual basis statement in the NOI is sufficient. Under the heading "Factual Basis for Claim," plaintiff related the symptoms that the decedent presented in her emergency room visit on January 22, 2002. He stated that the radiologist recommended "progress views" after the decedent's abdominal x-ray showed abnormalities indicative of a bowel obstruction. Under the heading "Manner the Applicable Standard of Practice or Care was Breached," plaintiff listed 20 general allegations, followed by three specific allegations:

u. Failed to admit patient to the hospital on January 22, 2002;

v. Failed to obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;

w. Failed to obtain progress x-rays of the abdomen and a CT scan on January 22, 2002 prior to discharging the patient[.]

Plaintiff alleged that Crittenton Hospital was vicariously liable for its employees' and agents' actions, and that it was also liable for the negligent supervision and hiring of employees and agents and for the negligent granting of staff privileges. He further alleged that REG was vicariously liable for Dr. Bauer's actions. He identified 19 paragraphs as describing the breaches for which Dr. Bauer was specifically responsible, and attributed the remaining paragraphs to Crittenton Hospital. The 19 paragraphs attributed to Dr. Bauer included paragraphs u through w, which alleged the specific breaches of the standard of care. Consequently, the factual basis was sufficient.

With respect to Dr. Bauer and REG's argument that the NOI failed to allege the actions that should have been taken or avoided in order to comply with the applicable standard of care, we agree that plaintiff's NOI, under the heading "Applicable Standard of Care or Practice Alleged," is the sort of tautology that was deemed insufficient in *Roberts*, *supra* at 693-694. When read as a whole, however, the NOI articulates that Dr. Bauer, the emergency room physician, breached the standard of care by failing to admit the decedent to the hospital, failing to obtain appropriate consultations, and failing to obtain certain diagnostic tests. The NOI also articulates that REG is vicariously liable for Dr. Bauer's breaches of the standard of care. A

[1] Although Dr. Bauer and REG challenged the breach of the standard of care and the proximate cause elements of the NOI below, they did not challenge the sufficiency of the factual basis. Accordingly, because the challenge relating to the factual basis was not preserved below, it is reviewed for plain error affecting substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

reader of the document is not left to guess at the functions that Dr. Bauer and REG should have performed to meet the standard of care.

We agree, however, that plaintiff's original NOI fails to articulate the *manner* in which defendants' alleged breach of the standard of care injured the decedent. There is no explanation of how Dr. Bauer's decision to discharge the decedent from the emergency room on January 22, 2002, without obtaining progress x-rays or other appropriate consultations, caused or contributed to her death one week later. Plaintiff does not allege any deficiency in the treatment the decedent received the following day, and there is no explanation for how the one-day delay diminished the decedent's opportunity for successful treatment and recovery. A reader of the NOI must guess that plaintiff's malpractice action might possibly be based on a theory that proper diagnostic testing on January 22 would have enabled Dr. Bauer to discover the decedent's illness and begin treatment then, before her condition became hopeless the next day. But to the extent that the original NOI was insufficient in this regard, we agree with plaintiff that his supplemental NOI, served on October 21, 2005, corrected this deficiency. The supplemental NOI added the following statement:

> [H]ad Dr. Bauer admitted the patient to the hospital on January 22, 2002 and had appropriate consult[ations] been obtained including surgery and GI and had progress X-rays been obtained the patient[']s peritonitis would have been diagnosed much earlier. The [perforated] colon would have been detected and surgery would have been performed much earlier. This would have avoided the overwhelming sepsis that led to multi organ system failure and ultimately death.

This statement articulates a causal connection between Dr. Bauer's alleged breaches and the decedent's death. If Dr. Bauer had ordered the proper diagnostic tests, timely diagnosis of the peritonitis and timely detection of the perforated colon would have led to treatment in avoidance of the sepsis that caused the decedent's organ failure and death. Thus, we conclude that the supplemental NOI remedied the deficiency in the original NOI.[2]

With respect to Crittenton Hospital, the supplemental NOI is deficient in certain respects, but nonetheless adequate. Paragraphs y through aa in both the original NOI and the supplemental NOI raise allegations of negligent supervision, negligent hiring, and negligent granting of staff privileges, but neither NOI includes any description of how Crittenton Hospital was negligent with respect to Dr. Bauer and REG's actions on January 22, 2002, or the manner in which that negligence caused the decedent's injury. Paragraph dd confusingly states that Crittenton Hospital is responsible "for all paragraphs not identified in bb," but no paragraphs are identified in paragraph bb. Assuming that plaintiff intended to reference paragraph cc, the incorporated paragraphs are as follows:

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[2] Because we conclude that REG is not entitled to summary disposition on the basis of an insufficient NOI, we need not address plaintiff's argument that, pursuant to MCL 600.2912b, he was not required to provide an NOI to REG because REG, as a professional corporation, is not a "health professional" or "health facility."

> b. Failed to ascertain and assure that trained and competent hospital personnel were, and would be, caring for and administering to the patient, and allowed untrained, and/or unqualified personnel to care for and treat the patient;
>
> * * *
>
> o. Failed to employ sufficient and competent physicians, nurses and other employees with which to provide reasonably prudent and proper medical care and service to the patient;
>
> p. Failed to establish and enforce or reasonably comply with Federal, State, industry, and professional standards . . . reasonably designed for the care of its' [sic] patients, and/or failed to comply with, or require compliance with its' [sic] own standards, bylaws, rules and regulations for the care of patients in the patient's condition;
>
> * * *
>
> s. Failed to ascertain the skill or qualifications of doctors who treated the patient and failed to provide, or adequately carry out through medical staff, reasonable procedures for the review, and/or supervision, of medical care furnished by doctors, to the patient[.]

Again, however, plaintiff failed to draw a causal connection between any of these alleged breaches of the applicable standard of care for a hospital and the decedent's death. Plaintiff alleged nothing regarding any staff member or physician other than Dr. Bauer's failure to order certain tests and failure to admit the decedent to the hospital. Plaintiff failed to explain how Crittenton Hospital was negligent in engaging Dr. Bauer in its emergency room as an employee, agent, or physician with staff privileges, or how this alleged negligence contributed to the decedent's death.

Despite these inadequacies, the supplemental NOI is sufficient by virtue of paragraph x, which alleges that Crittenton Hospital is responsible for its employees and actual or ostensible agents. Although the paragraph fails to explain the relationship between Dr. Bauer and Crittenton Hospital, it sufficiently permits an inference that Crittenton Hospital has an employment/agency relationship with Dr. Bauer that renders it vicariously responsible for Dr. Bauer's alleged negligence. As discussed previously, the supplemental NOI is sufficient to explain the manner in which Dr. Bauer's alleged breach of the applicable standard of care was the proximate cause of the decedent's injury. Accordingly, Crittenton Hospital, like Dr. Bauer and REG, was not entitled to summary disposition on the basis of an inadequate NOI.

IV. Affidavits of Merit

Defendants also argue that plaintiff failed to file with his complaint affidavits of merit that conformed to the requirements of MCL 600.2912d, which provides that a plaintiff claiming medical malpractice must file with the complaint an affidavit of merit signed by a qualified health professional. The affidavit must certify that the health professional has reviewed the

notice and all medical records supplied by the plaintiff's attorney, and must also contain a statement of each of the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

These requirements mirror four of the requirements specified for NOIs under MCL 600.2912b. An affidavit of merit requires no less specificity than a notice of intent. See *Mullaney v Kistler*, 471 Mich 932 (2004) (remanding for this Court to consider an affidavit of merit in light of *Roberts*); see also *King v Reed*, 278 Mich App 504, 516-517; 751 NW2d 525 (2008) (the Supreme Court's statement in *Roberts*, *supra* at 691-692, that a plaintiff must make a good-faith effort to aver the specific standard of care that is claimed to be applicable to each professional or facility applies equally to an affidavit of merit).

The affidavit of merit submitted by Dr. George Sternbach recites the alleged breaches of the standard of care, namely the failure to hospitalize the decedent on January 22, 2002, and to obtain appropriate consultations, and recites that "[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, [sic] died." The affidavit submitted by Dr. Fred Thomas states that if Dr. Bauer had admitted the decedent on January 22, 2002, and obtained the appropriate consultations, "Edris Ligons would not have died." To satisfy the requirement that an affidavit of merit state "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged," it is insufficient to merely allege that the defendant's alleged negligence caused the injury. *Roberts*, *supra* at 699 n 16. Like plaintiff's original NOI, the affidavits of merit contain no explanation regarding how Dr. Bauer's decision not to admit the decedent on January 22, 2002, or obtain appropriate consultations was the proximate cause of the decedent's death. The affidavits of merit, even when read as a whole, *Esselman v Garden City Hosp*, 284 Mich App 209; ___ NW2d ___ (2009), establish no connection between the purpose of the consultations, or what condition they might have revealed, and the cause of the decedent's death, nor do they explain how the one-day delay in admitting the decedent made the outcome death instead of recovery.

These deficiencies apply to all three defendants. The failure to explain how Dr. Bauer's breach of the applicable standard of care caused the decedent's death necessarily constitutes a failure to establish REG's and Crittenton Hospital's vicarious liability. We therefore conclude that the affidavits of merit were insufficient to comply with the statutory requirements.

V. Remedy

Defendants argue that the limitations period for filing a malpractice action has expired and, therefore, plaintiff's failure to file a complaint with a conforming affidavit of merit requires dismissal with prejudice. Plaintiff responds that dismissal with prejudice is not the proper remedy. According to plaintiff, because an affidavit of merit is a pleading, an affidavit of merit is subject to amendment and the amended affidavit relates back to the date of the filing of the complaint. Plaintiff requests that we remand the case to give him an opportunity to file a motion to amend the affidavits of merit.

A medical malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." MCL 600.5838a(1). As previously indicated, the two-year statutory limitations period applicable to medical malpractice actions, MCL 600.5805(6), expired before this action was filed. Consequently, plaintiff relies on the additional time afforded under the wrongful death saving statute, MCL 600.5852, which provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

MCL 600.5856 provides for tolling of statutes of limitations or repose. This statute provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

In *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004), our Supreme Court held that MCL 600.5856(c) (formerly MCL 600.5856[d]) is not applicable to toll the period prescribed under the wrongful death saving statute. The Court explained that "[MCL 600.5856(d)], by its express terms, tolls only the applicable statute of limitations or repose. . . . [T]he wrongful death provision, [MCL 600.5852], is a *saving statute*, not a statute of

limitations." *Id.* at 650 (citation and quotation marks omitted; emphasis in original). The Court further explained:

> By its own terms, [MCL 600.5852] is operational only within the context of the *separate* "period of limitations" that would otherwise bar an action. [MCL 600.5852] clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Id.* at 651 (emphasis in original).]

The Court concluded that the three-year ceiling provided by the wrongful death saving statute is not "tolled" when a plaintiff files a notice of intent after the expiration of the statute of limitations. *Id.* at 651-652.

In this case, the following dates are relevant:

January 22, 2002	Date of the alleged malpractice
April 26, 2002	Letters of authority issued to the decedent's husband, Herbert Ligons
January 22, 2004	Expiration of the two-year statutory limitations period
February 22, 2005	Letters of authority issued to plaintiff
June 8, 2005	NOI served on defendants
October 21, 2005	Supplemental NOI served on defendants
April 7, 2006	Complaint and affidavits of merit filed[3]
January 22, 2007	Expiration of the three-year "ceiling" under the wrongful death saving statute

In *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), our Supreme Court held that the filing of a complaint and an affidavit of merit tolls the statutory limitations period until the affidavit is successfully challenged as invalid. In other words, if a plaintiff files a complaint and an affidavit of merit before the statutory limitations period expires and the affidavit is subsequently determined to be invalid, the proper remedy is dismissal without prejudice, thereby enabling the plaintiff to file a complaint accompanied by a conforming affidavit of merit within the remaining time available under the statutory limitations period. In

[3] Plaintiff avers, and defendants do not dispute, that plaintiff was entitled to file his complaint 154 days after furnishing the NOI because defendants did not respond to either the original or the supplemental NOI. See MCL 600.2912b(8).

concluding that the limitations period is tolled until the affidavit of merit is successfully challenged, the Court relied on MCL 600.5856(a), which provides that statutes of limitations or repose are tolled when a complaint is filed. *Kirkaldy*, *supra* at 585.

However, our Supreme Court's decision in *Waltz* compels the conclusion that there is no similar tolling of the wrongful death saving period, because the wrongful death provision, MCL 600.5852, is a *saving statute*, not a statute of limitations. Although *Waltz* involved the application of former MCL 600.5856(d), rather than MCL 600.5856(a), this distinction is immaterial because the "statutes of limitations or repose" limitation applies generally to the entire statute. Thus, the filing of a complaint and an affidavit of merit does not toll the running of the wrongful death saving period. Accordingly, if an affidavit of merit is subsequently successfully challenged as invalid and there is no remaining time available under the wrongful death saving period, dismissal with prejudice is required.[4]

Plaintiff argues that because an affidavit of merit is a pleading, it can be amended pursuant to MCR 2.118(A). Because an amended pleading relates back to the date of the originally filed pleading, MCR 2.118(D), plaintiff claims that an amended affidavit of merit would fall within the wrongful death saving period. Caselaw does not directly negate plaintiff's argument that an affidavit of merit is a pleading. In *Barnett v Hidalgo*, 478 Mich 151, 160-161; 732 NW2d 472 (2007), our Supreme Court described an affidavit of merit as "part of the pleadings" in regard to its holding that the statements contained therein are admissible as party-opponent admissions under MRE 801(d)(2)(B) and (C). In *Kowalski v Fiutowski*¸ 247 Mich App 156, 164; 635 NW2d 502 (2001), this Court stated that "when a defendant fails to file an affidavit of meritorious defense, that defendant has failed to plead." However, neither of these cases directly held that an affidavit of merit is, in itself, a pleading. The term "pleading" is restrictively defined in MCR 2.110(A) as including only (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counter-claim, or third-party complaint, and (6) a reply to an answer. The court rule does not define the term "pleading" to include mandatory attachments such as an affidavit of merit. In the absence of any positive authority suggesting that an affidavit of merit may be amended pursuant to MCR 2.118(A), we conclude that the only permissible remedy for a defective affidavit of merit is the one prescribed in *Kirkaldy*, which is dismissal. See also *Jackson v Detroit Med Ctr*, 278 Mich App 532, 543; 753 NW2d 635 (2008) (indicating that the proper remedy for a defective affidavit of merit is not amendment but dismissal).

VI. Conclusion

In sum, although we conclude that plaintiff's supplemental NOI was sufficient to comply with statutory requirements, we conclude that the affidavits of merit were not, and that dismissal

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[4] Contrary to plaintiff's assertion, the wrongful death saving statute does not require that a wrongful death action must be completed before the three-year "ceiling" expires. The saving statute only requires that an action be "*commence[d]* . . . within 3 years after the period of limitations has run." MCL 600.5852 (emphasis added).

is required. Because the wrongful death saving period was not tolled and because that period has since expired, the dismissal must be with prejudice. Accordingly, we reverse the trial court's decision denying defendants' motions for summary disposition and remand for entry of an order of dismissal with prejudice.

Reversed and remanded for entry of an order of dismissal with prejudice. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot